

THE RIGHTS OF A RAPE VICTIM IN ISLAMIC LAW

*Azman bin Mohd Noor and
Ahmad Basri bin Ibrahim**

ABSTRACT

Rape victims undergo double jeopardy as they experience unwanted aggression against their freewill which make them suffer physically and mentally, and at the same time they have to fight to be treated fairly and respectfully within the legal environment. There has been a controversial issue regarding rape prosecution in Islamic legal system as the rape victim would be either charged with zinā (illegal sexual intercourse) because of her confession or qadhf (false accusation) as a result of her failure to bring four male eyewitnesses. This paper aims at investigating the fundamental rights of rape victims provided in Islamic law. This will include legal rights to be defended fairly, exemption of punishment, adequate compensation, and other essential rights. This study will explore opinions and arguments of classical Muslim jurists from various schools of law.

* Assistant Professors, Department of Fiqh and Usul and Fiqh, Kulliyah of Islamic Revealed Knowledge and Human Sciences, International Islamic University Malaysia.

INTRODUCTION

In an appeal in Resolution A/res.40/34 29 November 1985 the UN General Assembly demands that all member countries actively carryout the principles of the “Declaration of the Fundamental Principles of Justice for the Victims of Crime and Power Abuse.” This law is of great juridical importance and officially attracts the attention of large international organizations on the victim’s rights. Among the important issues highlighted in the declaration are providing means of access to justice and the right to be treated respectfully within a legal environment, adequate compensation to be paid by the offender and an efficient form of compensation scheme provided by the government. This paper aims at investigating fundamental rights of rape victims provided in Islamic law. This includes the right to be protected for defending her honour, legitimacy of reaction against physical assault, exemption of being charged with committing *zinā* or *qadhif* i.e. false accusation of committing *zinā* against the rapist when there is no sufficient evidence such as the lack of four male eyewitnesses while making a complaint of being raped. The paper also sheds light on the possible profound remedies and compensations provided by the *Shari’ah* for the victim of rape.

THE RIGHTS OF PROTECTION

Women’s chastity must be respected and protected at all times regardless of her religion. She must not be abused physically and morally under any circumstances. All promiscuous relationships are forbidden to her, irrespective of the position of the woman whether she is willing or against the act.¹ Furthermore, *zinā* is an act that is harmful to society as a whole. Allah has warned Muslims about how bad such an act is and how they must not even go near it. Allah says, “And come not near unto unlawful sexual intercourse. Verily, it is a greatly lewd act and evil way.” (The Qur’ān, 17:32). Thus, if *zinā* is an evil deed in the sight of Allah even when such act is committed by mutual consent, rape should then be considered worse than *zinā*.

¹ Mawdudi, Abul A’lā. *Human Rights in Islam*. Leicester: The Islamic Foundation, 1980, p. 18.

In Islamic law, there are five essential elements which should be preserved and protected at all times. They are known as *maqāṣid al-sharī‘ah* which consists of religion, life, intellect, lineage and property. In fact, any legal rulings in Islamic law are laid down by Allah to preserve and protect these five essential elements. As such, each Muslim has to defend his/her own or another person’s faith, life, intellect, property and lineage. Rape is an aggression not only against one’s life because it may cause death or physical injury but also the victim’s honour and the dignity of her family as a whole. The Sharī‘ah legalizes reaction against the intruder based on the following verses:

“And indeed whosoever takes revenge after he has suffered an aggression, for such, there is no way of blame against them.” (The Qur’ān, 42:41).

“Whoever transgresses the prohibition against you, transgress likewise against him” (The Qur’ān, 2:194).

These verses imply that it is permissible for the oppressed to overcome the oppressor in order to defend his rights. His or her reaction against violence is legitimate. The intruder is considered as an oppressor and reaction against him is considered to be self defense against crimes.

There are many authentic ḥadīths of the Prophet (s.a.w.) that support these verses. Among them are the following:

A ḥadīth reported by Abū Sa‘īd al-Khudrī that the Prophet (s.a.w). said:

“Those of you who see vice should change it with their hands; if unable, then with their tongue; and if unable, then with their heart; and this [last manner] is the lowest degree of belief.”²

A ḥadīth reported on the authority of Abū Hurayrah:

“If someone is spying on you at your home without

² Narrated by Muslim in his *Ṣaḥīḥ*, book of *al-Īmān*, number of the ḥadīths: 70.

permission, and you stone him even if you injure his eye, you are regarded as innocent.”³

And another ḥadīth on the authority of Sa‘īd ibn Zayd says:

“He who is killed while shielding his family is a martyr, he who is killed protecting his property is a martyr, he who is killed defending his life he is a martyr and he who is killed protecting his religion is a martyr.”⁴

These ḥadīths in general show the importance of prohibiting evil, and rape is an evil act that must be punished. Based on these ḥadīths, Muslim jurists unanimously agree that it is recommended for every individual to resist against sexual aggression. A rape victim is allowed to cause even severe injury or casualty on the aggressor provided there is no other way out. This is based on the reason that consenting to illegal intercourse is strictly prohibited. Thus, absence of resistance signifies giving permission to the evil action. This ruling also implies that everybody is to protect his dependants particularly his wife, daughters and sisters as well as others who are vulnerable, from sexual assault.⁵

With regard to protecting family members from sexual aggression, the Ḥanbalites assert that protecting one’s honour by resisting aggression against one’s wife is obligatory because it involves his right and the right of Allah.⁶ Their opinion is supported with a ḥadīth narrated by al-Mughīrah, Sa‘ad ibn ‘Ubādah said: “If I find a man sleeping with my wife, I will hit him with my sword.” When the Prophet (s.a.w.) heard

³ Al-‘Asqalānī, Ibn Ḥajr, Aḥmad ibn ‘Alī. *Fatḥ al-Bārī*. Beirut: Dār al-Ma‘rifah, 1379AH, Kitāb al-Diyah, vol. 15, p. 267.

⁴ Narrated by al-Nasā’ī in his *Sunan*, book of *Taḥrīm al-Dam*, number of the ḥadīth: 4026. Narrated by al-Tirmidhī in his *Sunan*, book of *al-Diyāt*, number of the ḥadīth: 1341. He authenticated the ḥadīth and classified it as *Ḥasan Ṣaḥīḥ*. Al-Albānī, Muḥammad Nāṣir al-Dīn, *Irwā’ al-Ghalīl*. Beirut: al-Maktab al-Islāmī, 1399AH, No. 708.

⁵ ‘Awdah, ‘Abd al Qādir. *al-Tashrī‘ al-Jinā‘ī al-Islāmī muqāranan bi al-qānūn al-waḍ‘ī*. Beirut: Mu’assasat al-Risālah, 1985, vol. 1, p. 474.

⁶ Al-Bahūtī, Manṣūr ibn Yūnus ibn Idrīs. *Kashshāf al-Qinā’*. Ed. Hilāl Musaylahī. Beirut: Dār al-Fikr, 1412 AH, vol. 6, p. 104.

what was said, he said: "Are you amazed with Sa'ad's jealousy? I am more jealous than him and Allah is more jealous."⁷

The Shāfi'ites generalise the responsibility of stopping sexual aggression although it is against an *ajnabī* (unrelated either by blood or marriage) woman. It is also reasoned that everyone's honor will never become legitimate, therefore it becomes compulsory to defend it.⁸

IS THERE ANY LIABILITY FOR CAUSING SEVERE INJURY OR FATALITY WHILE DEFENDING ONESELF?

The jurists extensively discuss the issue of causing injury or fatality to the assailant of honor. The majority of jurists are of the opinion that there will be no retaliation on the defendant who caused death to the assailant in defending her life provided there is no other way to defend one's self except by doing so.⁹ This is on the ground that the culprit had committed a crime that makes his blood unprotected and thus he is no longer infallible.¹⁰ Forcible sexual intercourse itself is against the right of Allah for which the sentencing should not be postponed. On the other

⁷ Al-Bukhārī, Muḥammad ibn Ismā'īl. *al-Jāmi' al-Ṣaḥīḥ*, Cairo: Al-Maktabat al-Salafiyyah, 1400 AH, vol. 8, p. 210.

⁸ Al-Shīrāzī, Abū Ishāq Ibrāhīm ibn 'Alī ibn Yūsuf. *al-Muhadhdhab fī fiqh al-Imām al-Shāfi'ī*. Ed. Muḥammad al-Zuhaylī. Beirut: al-Dār al-Shāmiyyah, 1996, vol. 2, p. 224. al-Ḥaṭṭāb, Muḥammad ibn 'Abd al-Raḥmān al-Maghribī. *Mawāhib al-Jalīl*. 2nd edn. Beirut: Dār al-Fikr, 1398 AH, vol. 6, p. 323, Ibn 'Ābidīn, Muḥammad Amīn ibn 'Umar. *Ḥāshiat Rad al-Mukhtār*. Beirut: Dār al-Fikr, 1387AH, vol. 6, p. 454.

⁹ 'Awdah. *al-Tashrī' al-Jinā'ī al-Islāmī*. vol. 1, p. 473.

¹⁰ There is no liability for acts against a person who is not protected, whose blood is no longer infallible. The limits of self defence are determined accordingly. In general it is recognized only in the case of a dangerous attack (not for instance, of an attack with a stick in a city in daytime, in contrast with similar attack outside a city or at night). There is further no liability, of course, for carrying out *ḥadd* or *ta'zīr* punishment; also if a man surprises his wife or his female *maḥram* in unlawful intercourse and kills her and/or her accomplice. See Schacht, Joseph. *The Origins of Muhammad Jurisprudence*. Oxford, England: Clarendon Press, 1979, p. 184.

hand, he could probably get himself exempted from severe punishment through the process of a legal trial.¹¹

Ibn Qudāmah reports that Imām Aḥmad was asked about a woman with whom an intruder wanted to have sex forcibly; she resisted and eventually killed him in order to defend herself. He said if I knew that he wanted to forcibly have sex with her, and she killed him she is innocent. Imām Aḥmad narrated a ḥadīth reported by al-Zuhrī from Ibn ‘Umar that: “A man invited a number of people from the Huzayl tribe, and he wanted to force himself on a woman, who in defence stoned him to death. In this particular case, ‘Umar ruled that he is not entitled to blood money.” Ibn Qudāmah therefore concludes that since it is compulsory to defend her property from aggression, it is obligatory on her to defend her honor.¹²

Ebu Su‘ud a famous Ottoman grand mufti, issued a religious decree with regard to fighting for self defense. Killing in order to prevent sexual assault or for the reason of protecting one’s honor is a related category of homicide, which Ebu Su‘ud enthusiastically exempts from liability. He was asked a hypothetical question: “Zeid enters Hinds house and tries to have intercourse forcibly. Since Hind can repel him by no other means, she strikes and wounds him with an axe. If Zeid dies of wound, is Hind liable for anything? He answers: “She has performed an act of Holy War.”¹³

¹¹ Al-Khurashī, Abū ‘Abdullah Muḥammad ibn ‘Abdullah. *Ḥāshiat al-Khurashī ‘alā Mukhtaṣar Sīdī Khalīl*. Cairo: Maṭba‘at al-Amīrat al-Sharafiyyah, 1316 AH, vol. 5, p. 4-4, al-Bahūtī. *Kashshāf al-Qinā’*, vol. 5, p. 607.

¹² Ibn Qudāmah, Muwaffaq al-Dīn Abī Muḥammad ‘Abdullah ibn Aḥmad ibn Muḥammad al-Maqdisī. *al-Mughnī*. Beirut: Dār al-Fikr, 1405AH, vol. 10, p. 352.

¹³ Imber, Colin. *Ebu’s-su‘ud: the Islamic Legal Tradition*, Edinburgh: Edinburgh University Press, 1997, p. 250. Ebu Su‘ud is equally forceful in applying the same principle to cases of homosexual assault. It is quoted from him, if Zeid wishes to sodomize the beardless Amr, Amr has no other way to escape, and so kills Zeid with a knife. He explains the case in the presence of the judge, and the people of the village bring testimony saying Amr is truthful. Is their testimony heard? Ebu Su‘ud stated: There is no need for testimony. So long as Zeid is a wicked person, Amr cannot be touched. Their testimony merely reinforces this.

This is because, by wounding and ultimately killing her assailant, the woman has prevented an act of fornication, which is an offence against God.¹⁴

PRE-REQUISITES TO REACT HARMFULLY AGAINST AN ASSAILANT¹⁵

In Islamic law, legal defense decriminalizes an act under certain limited conditions. Muslim jurists hold that either coercion or duress renders a person exempted from liability. The legal principle “Necessity renders prohibited things permissible”¹⁶ implies that a person is allowed to commit an act or an omission accordingly under a compelling physical violence caused by another human being. The jurists prescribe that he will be excused for withholding criminal responsibility if these conditions are met:

1. The nature of usurpation is against one’s honor i.e. sexually oriented. Simultaneously, the act is committed in order to protect oneself or another.
2. The defender should use only a certain degree of force that is necessary to repel aggression without abuse or excess. If the force used is excessive, the defender will be held criminally responsible. Evaluation of the degree of force is left to the judge’s discretion, based on the circumstances surrounding each case.

¹⁴ *Ibid.*

¹⁵ Al-Bahūtī. *Kashshāf al-Qinā’*, vol.6, p.155; Ibn Qudāmah. *al-Mughnī*, vol. 10, p. 352; al-Shirāzī. *al-Muhadhdhab*, vol. 2, p. 224; al-Dasūqī, Muḥammad ibn Aḥmad. *Ḥāshiat al-Dasūqī ‘alā al-sharḥ al-kabīr*. Beirut: Dār al-Fikr, vol. 4, p. 239; Ibn ‘Ābidīn. *Ḥāshiat Rad al-Mukhtār*, vol. 6, p. 546.

¹⁶ *Al-Majallah*, article 21, *al-Ḍarūrat tubīḥ al-Maḥzūrāt*. For more discussion of this maxim, see al-Zarqā’, Mustafā Ibn Aḥmad. *al-Madkhal al-Fiqhī al-‘Ām*. 6th edn. Damascus: Maṭba‘at al-Jāmi‘ah, 1959, vol. 2, p. 995-996; al-Nadawī, *al-Qawā‘id al-Fiqhiyyah*, p. 308.

3. The reaction must be an immediate response when it is impossible to rely at the crucial moment, on the protection of public authorities. The reaction must be the last chance. There is no other way to avoid the crime except by physical reaction. The defendant should reasonably believe that any harm he causes would prevent greater harm.
4. The intruding perpetrator must be in a position to commit physical violence of rape and he is capable of doing so. It is not to be considered as a compelling situation if the coercer is a young child.
5. The victim must reasonably believe that his act or omission is necessary to avoid infringement of honor and dignity, possible imminent death or serious bodily injury. Those damages are deemed as immediate consequences if there is no instant reaction.
6. The reaction must be appropriate and approximate to the danger. In other words, it must be encountered by the same level of aggression starting from one's strength to using a deadly weapon. Most of the jurists argue that in the case of sexual usurpation, the victim has the right to react harmfully against the assailant, regardless of the procedural steps based on two reasons:
 - a. An assault by a will normally end up with intercourse, therefore an instant reaction is necessary, by whatever means, including causing injury to the assailant.
 - b. The crime of illegal sexual intercourse is a very serious *ḥadd* crime of which there is no compromise at all. A prompt reaction is called for.

According to this opinion, it is permissible to react harmfully against the assailant regardless of his marital status, which makes a difference in the case of *zinā*. The jurists agree that it is compulsory to defend oneself against attack of honor. It becomes obligatory to react accordingly in order to defend oneself or to rescue others when these conditions are met. The person who reacts will be divinely rewarded and the one who refuses will be sinful.

EXEMPTION OF PUNISHMENT

A rape victim deserves means of access to justice and the right to be treated respectfully within the legal environment. The problem arises in some modern Islamic courts whether or not to adopt the same standard of proof as for *zinā*. In Pakistan, the legal system has provided the same standard of proof requiring the testimony of four male witnesses. As a result, many rape offences fail to be convicted for lack of witnesses.¹⁷ Even worse than that, sometimes the court has concluded that intercourse was therefore consensual, and consequently charged rape victims with *zinā*.¹⁸ The case is the same in Northern Nigeria which is predominantly Mālikites who hold the opinion that pregnancy alone is sufficient evidence of committing *zinā*.¹⁹

¹⁷ The offence of *zinā* (Enforcement of Hudood) Ordinance, 1979, section 8 provides the proof of *zinā* or *zinā bi al-jabr* is either by confession of the accused or the testimony of four male adult witnesses. See Waqar ul-Haq, M. *Islamic Criminal Laws, Hudud Laws and Rules with up to date commentary*. Lahore: Nadeem Law Book House, 1994, p. 151.

¹⁸ This is because of the assumption that an allegation of rape is an admission of sexual intercourse; therefore the dismissal of the prosecution case amounts to an implied confession of adultery. In 1985, Safia Bibi, a sixteen year old nearly blind domestic servant reported that she was repeatedly raped by her employer and his son, and became pregnant as a result. When she charged the man with rape, the case was dismissed for lack of evidence, as she was the only witness against them. Safia, however, being unmarried and pregnant, was charged with *zinā* for not having conclusive evidence to show that the unexplained pregnancy was because of rape. The Session court at Sahiwal convicted her for *zinā* and sentenced her to 3 years rigorous imprisonment, 15 lashes, and a fine of Rs.1000/-. (Bibi v. State, 1985 P.L.D Fed. Shariat Ct.120). See Asma Jahangir and Hina Jilani. *The Hudood Ordinances; a Divine Sanction?*. Lahore: Rhotas Books, 1990, p. 88.

¹⁹ According to the Mālikites, pregnancy is considered sufficient evidence of committing *zinā*. The oath of the man denying having sexual intercourse with the woman is often considered sufficient proof of innocence unless four independent and reputable eyewitnesses bear witness confirming his involvement in the crime. In Nigeria, Safiya

The Mālikites furthermore, argue that if a woman were to claim that she was the victim of rape, her claim would not be accepted unless there were some indicators or signs that support her claim. For example, if she had come bleeding or injured or having torn clothes or screaming for help earlier, that would be sufficient evidence to prove her claim. But if nothing of that nature and the like occurred earlier, her claim of rape when her pregnancy had become apparent would not be accepted.²⁰ According to the majority of Muslim jurists however, her pregnancy is not a sufficient evidence to charge her with the crime of *zinā*. This is because there are many possibilities that caused her pregnancy, such as rape, sexual intercourse by mistake, one's semen entered her body without sexual intercourse, etc. Therefore, they argue that she should not be punished for *zinā* since such punishments are not to be enacted when there is any amount of doubt.²¹ The Prophet (s.a.w) said: "Avert the *ḥudūd* punishments from the Muslims as much as you can. If you find any way out for a person, let him go. That is because it is better for the judge to make mistake in forgiveness rather than to make mistake in punishment."²²

In any case, there is no disagreement among the Muslim jurists that there is no *ḥadd* for the coerced woman. There are explicit *nuṣūṣ* (texts) from the Qur'ān and ḥadīth proving that rape has a different

Hussaini was sentenced to death in her first trial for adultery on the basis of her pregnancy. Based on the cases of Bariya Ibrahim Magazu and Safiya Hussaini, Baobab for Women's human rights and Amnesty International emphasize that Sharia Law as implemented in the northern states of Nigeria, does not protect women from possible sexual assault and coercion, instead it is willing to punish the victims of such assault. In both cases the Court has not pursued the allegations of coercion. The victims of rape or coercion have their situation further compounded. They will be subjected to charges of *zinā* and false accusation. This clearly violates women's rights, justice and security while protecting the criminals.

²⁰ For further reading, see al-Sadlān, Ṣāliḥ. *al-Qarā'in wa dawruhā fī al-Ithbāt fī al-Sharī'ah al-Islāmiyyah*. Riyadh: Dār Balansiyah, 1416AH.

²¹ Zarabozo, Jamal al-Din M. *Commentary on the Forty Hadith of Al-Nawawi*. USA: Al-Basheer Company for Publications and Translations, vol. 3, p. 1180.

²² Narrated by al-Bukhārī in his *Ṣaḥīḥ*, book of *al-Ḥudūd*, number of hadith: 1344.

conception compared to *zinā* especially in terms of proving and conviction.²³ For example, ‘Abd al-Jabbār Ibn Wā’il reported that at the time of the Prophet (s.a.w), a woman was raped and she was excused from punishment: “When a woman went out for prayer, a man attacked her and raped her. She shouted and went off, and when a man came by, she said: “That man did such and such to me.” And when a company of Anṣār came by, she said: “That man did such and such to me.” They went and seized the man whom they thought had had intercourse with her and brought him to her. She said: “Yes this is the one.” Then they brought him to Allah’s messenger. When he was about to pass sentence, the man who had assaulted her stood up and said: “Apostle of Allah, I am the man who forced her against her will.” The Prophet (s.a.w) said to the woman: “Go away, for Allah has forgiven you.” And about the man who had intercourse with her, he said: “Stone him to death.”²⁴

According to this ḥadīth, proving rape seems to be different from proving *zinā* because the Prophet (s.a.w) accepted the solitary evidence of the raped woman, in the absence of the testimony of four eyewitnesses. This ḥadīth also leaves absolutely no doubt of the validity of the evidence of women in rape cases although it is not accepted for the *ḥadd* of adultery where it requires four just men.

The misconception and confusion of generalizing adultery to rape should not exist as they differ in proving and convicting. The assumption that a rape victim has to present four eye-witnesses to prove rape and failure of providing sufficient evidence should be regarded as admitting *zinā* or committing *qadhif* is against the principle of evidence and against common sense, because a confession is an admission of guilt while an allegation of rape is a repudiation of guilt.

²³ According to Shāfi‘ī, Aḥmad and one view that is attributed to Abū Ḥanīfah, whenever there is a *naṣṣ* on a matter, *qiyās* is absolutely redundant. *Qiyās* is only applicable when no explicit ruling could be found in the sources. Since recourse to *qiyās* in the presence of *naṣṣ* is *ultra vires* in the first place, the question of the conflict arising between the *naṣṣ* and *qiyās* is therefore of no relevance. See Abū Zahrah, Muḥammad. *Uṣūl al-Fiqh*. Cairo: Dār al-Fikr al-‘Arabī, 1998, p. 200.

²⁴ Al-Bukhārī. *Ṣaḥīḥ al-Bukhārī*. Vol.6, p. 254. al-Bayhaqī, Aḥmad Ibn al-Ḥusain Ibn ‘Alī. *al-Sunan al-Kubrā*. Haydar Ābād: Dā’irat al-Ma‘ārif al-Nizāmiyyah al-‘Uthmāniyyah, 1934/1355AH, vol. 8, p. 235.

COMPENSATION FOR FORCIBLE ILLEGAL INTERCOURSE

Ibn Rushd observes that most scholars agree with applying the *ḥadd* penalty for *zinā* to a convicted rapist.²⁵ This means the convict will receive similar punishment for the offence of *zinā* which is stoning to death for the married (*muḥṣan*), or flogging of 100 lashes and deportation for the unmarried (*ghayr-muḥṣan*).²⁶ He notes however, that they disagree on the second part of penalty, i.e. whether the convicted rapist has to pay a dowry besides being sentenced to the *ḥadd* penalty. This is because they differ whether *ṣadāq* (dowry) is a compensation for the sexual intercourse which should be imposed in lawful as well as unlawful cases. Those who say that it is a gift required exclusively for marriage would not impose dowry on the culprit in this case.²⁷

The majority of jurists, including Mālik, Shāfi‘ī, the Ḥanbalites and Laith Ibn Sa‘ad take the stance of punishing him with both the *ḥadd* and *ṣadāq*.²⁸ The same opinion is reported from ‘Alī ibn Abī Ṭālib, Ibn

²⁵ Ibn Rushd, Abū al-Walīd Muḥammad ibn Aḥmad. *The Distinguished Jurist's Primer (Bidāyat al-Mujtahid)*. Trans. Imran Ahsan Khan Nyazee. Reading: Centre for Muslim Contribution to Civilization, 1996, vol. 2, p. 324.

²⁶ Pakistan's Offence of *zinā* (Enforcement of Hudood) Ordinance (VII of 1979) provides the definition and punishment of rape or what is termed as *zinā bi al jabr* (*zinā* by force). Section (6) provides the punishment for the guilty of rape in the sub-section no 3:

- (a) if he or she is a '*muḥṣan*' be stoned to death at a public place or
- (b) if she or he is not '*muḥṣan*' be punished with whipping numbering one hundred stripes, at a public place, and with such other punishment, including the sentence of death, as the court may deem fit having regard to the circumstances of the case.

²⁷ Ibn Rushd. *Bidāyat al-Mujtahid*. vol. 2, p. 530.

²⁸ Al-Shāfi‘ī, Muḥammad ibn Idrīs. *al-Umm*. Cairo: Dār al-Sha‘b, 1321AH, vol. 3, p. 230. Mālik Ibn Anas, *al-Mudawwanah al-Kubrā*. Cairo: al-Sa‘ādah Press, 1905, vol. 4, p. 401. Ibn Mufliḥ, Abū Ishāq Burhān al-Dīn Ibrāhīm ibn Muḥammad, *al-Mubdi‘ sharḥ al-Muqni‘*. Ed. Muḥammad Ḥasan Ismā‘īl al-Shāfi‘ī. Beirut: Dār al-Kutub al-‘Ilmiyyah, 1997, vol. 9, p.72. Ibn Rushd. *Bidāyat al-Mujtahid*. vol. 2, p. 324.

Mas‘ūd, Sulaymān Ibn Yasar, Rabī‘ah and ‘Aṭā’.²⁹ Imām Mālik generalizes the verdict to cover an insane woman and also an unconscious sleeping woman. His argument is based on the fact that rape involves the right of Allah and the right of an individual and these must be dealt with separately. Both deserve different treatment respectively, as is the ruling in the case of stealing.³⁰ The Mālikites make no difference between a virgin victim and a non virgin in terms of receiving dowry compensation.³¹ They support the notion of imposing a dowry in addition to the *ḥadd* penalty with the hadith:

“If any woman gets married without the permission of her (father) *walī*, the marriage is nullified. If the man consummates the marriage with her, he is obliged to pay her the dowry for legitimizing the sexual relation. If there is a conflict, the sultan, i.e. authority, is the *walī* for those who have no *walī*.”³²

In another ḥadīth, the Prophet ṣ.a.w. decreed that the husband has to pay the dowry for an invalid marriage when the woman has not completed her ‘*iddah* (waiting period).³³ What this ḥadīth indicates is that the action of “legalizing” sexual intercourse itself is the major issue which makes him accountable to pay dowry.³⁴

Looking at it from a different angle, the Shāfi‘ites support the idea of imposing dowry based on *qiyās* (analogy) that the illegal intercourse in rape is similar to the one in invalid marriage (*nikāḥ fāsīd*)

²⁹ Mālik Ibn Anas. *al-Mudawwanah al-Kubrā*. vol. 4, p. 401. Ibn Farḥūn, Ibrāhīm ibn ‘Alī. *Tabṣirat al-Ḥukkām fī usūl al-aqḍiyyah wa al-aḥkām*. Beirut: Dār al-Kutub al-‘Ilmiyyah, 1995, vol. 2, p. 256. Ibn Juzayy al-Kalbī, *al-Qawānīn al-Fiqhiyyah*. Ed. Muḥammad Amīn al-Dinnawī. Beirut: Dār al-Kutub al-‘Ilmiyyah, 1998, p. 285.

³⁰ Mālik Ibn Anas. *Ibid*.

³¹ Al-Maghribī, Muḥammad ibn Abdul Raḥman, *Mawāhib al-Jalīl*, Beirut, Dār-al-Fikr, 1398AH, 2nd ed. vol. 3, p. 518.

³² Al-Albānī. *Irwā al-Ghalīl*. No 1944. The ḥadīth has been verified to be ṣaḥīḥ (authentic).

³³ Al-Albānī. *Ibid*, no. 2124. The ḥadīth has been verified as ṣaḥīḥ (authentic).

³⁴ Ibn Qudāmah. *al-Mughnī*. vol. 7 p. 209.

where the so called-husband has to pay the fair *mahr* if there had been consummation. Similarly, the rapist is considered to be liable for compensation (*ḍaman*) in a rape case because of the intercourse.³⁵ Besides a fair dowry, the Shāfi'ites impose *arsh/diyah* (blood money) if the man has caused injury to the hymen of virginity. Hymen is regarded as one's personal belonging, and the legal principle states that any infringement of others' belonging renders compensation. Ibn Qudāmah opposes this opinion arguing that the dowry itself entails all sorts of compensation. According to him, a virgin victim must be given a higher compensation than a widow because of her virginity. This extra payment is part of that *arsh*.³⁶ Ibn Qudāmah argues further that the criminal has to pay *diyah* if the victim becomes pregnant and dies upon delivery, because this has been caused by his violence.³⁷

Abū Ḥanīfah, Thawrī and Ibn Shubrumah in their own case hold the opinion that rapists are liable for the *ḥadd* penalty only, and not for the dowry (*ṣadāq*). They argue that when the right of Allah meets the right of individuals, the right of Allah prevails. They also reason that *ṣadāq* is not redemption for sexual pleasure, but for a ritual purpose. Therefore they maintain there should be no *ṣadāq* for the illegal intercourse.³⁸ Abū Ḥanīfah in his own asserts that if a man has intercourse with a free woman by force and she dies because of the violence, he must pay *diyah* besides being liable for the *ḥadd* penalty.³⁹ These three scholars base their argument on the very same hadith of 'Abd al-Jabbār Ibn Wā'il which clarifies that no dowry was charged on the man.⁴⁰ In fact, according to the version recorded by al-Tirmidhi's and al-Nasā'ī, it is clearly mentioned that there was no monetary penalty (*ṣadāq*) imposed on him.

³⁵ Al-Shīrāzī. *al-Muhadhdhab*. vol. 2, p. 62.

³⁶ Ibn Qudāmah. *al-Mughnī*. vol. 7, p. 209.

³⁷ Abū Muḥammad 'Abdullah ibn Qudāmah, Zuhayr al-Shāwis. *al-Kāfī fi fīqh Ibn Ḥanbal*. Beirut: al-Maktab al-Islāmī, 1988, vol. 4, p. 61.

³⁸ Ibn Rushd. *Bidāyat al-Mujtahid*. vol. 2, p. 324.

³⁹ Al-Kāsānī, 'Alā' al-Dīn Abū al-Ḥasan 'Alī ibn Sulaymān. *Badā'i' al-Ṣanā'i'*. 2nd edn. Beirut: Dār al-Kitāb al-'Arabī, 1982, vol. 7, p. 61. Ibn 'Ābidīn, Muḥammad Amīn ibn 'Umar. *Ḥāshiat Rad al-Mukhtār*. Beirut: Dār al-Fikr, 1387AH, vol. 4, p. 30.

⁴⁰ Al-Bukhārī. *Ṣaḥīḥ al-Bukhārī*. vol. 6, p. 254. al-Bayhāqī. *al-Sunan al-Kubrā*. vol. 8, p. 235.

Ibn Ḥazm reported a case of sexual assault brought to Ḥasan ibn ‘Alī where a virgin girl lost her virginity because of physical attack by one girl using her bare finger to penetrate her vagina, while her friends held the victim. Ḥasan issued that they all have to pay a fair dowry. Another occasion where Iyyād ibn ‘Abdullah, a judge in Egypt consulted ‘Umar ibn ‘Abd al ‘Azīz regarding a boy, penetrating a girl’s vagina with his finger and broke her hymen. The Caliph asked the judge to decide based on *ijtihād*. He ordered that the boy’s family to pay 50 dīnār.⁴¹

Contrary to this, Ibn Ḥazm is opposed to imposing any fair dowry (*mahr mithl*) in the case of breaking virginity, because it is not a marriage. He supports his opinion with the ḥadīth: “Indeed your property, your life are protected.” The *mahr* is only necessary in legal marriage. There is no evidence from the Qur’ān, ḥadīth or *ijmā’* imposing such monetary penalty irrespective of having the hymen torn either by a man or a woman. Therefore, he maintains that the ruling is baseless since it is not the command of Allah and his Messenger.⁴²

However, Ibn Ḥazm’s argument can be refuted by the fact that in some other wording of the same ḥadīth, the Prophet (s.a.w) mentioned “your honor and your body.”⁴³ Breaking one’s virginity by illegal means is definitely a infringement against the human body which renders compensation. As the compensation is compulsory in the case of blood and property, it is also compulsory for the case of a physical attack. Committing illegal intercourse is actually a disgusting crime against the human body.⁴⁴

REMEDIES BASED ON THE DOCTRINE OF *QIṢĀṢ*

According to Islamic criminal law, the punishment for homicide and the infliction of injury (*jirāh*) is classified under the doctrine of *Qīṣāṣ*

⁴¹ Ibn Ḥazm, ‘Alī ibn Aḥmad. *al-Muḥallā bi al-Āthār*. Beirut: Dār al-Kutub al-‘Ilmiyyah, 1408AH, vol. 8, p. 476.

⁴² Ibn Ḥazm. *al-Muḥallā*. vol. 8, p. 476.

⁴³ Al-Bukhārī. *al-Jāmi’ al-Sahīḥ*. Ḥadīth No. 7078.

⁴⁴ Al-Sa’dī, ‘Abd al-Mālik ‘Abd al-Raḥmān. *al-‘Alāqāt al-Jinsiyyah ghayr al-Shar’iyyah wa ‘uqūbatuha fī al-sharī’ah wa al-qānūn*, Baghdad: Maṭba‘ah al-Irshād, 1975, 1st ed., p. 479.

(retaliation). Thus, whenever a person causes physical harm or death to another, the injured or the family of the deceased has the right of *qisās* (retaliation). *Qisās* itself is divided into three categories: homicide (*fi al Nafs*), wounds or injuries (*dūn al nafs*) which is usually known as *qawad* or ‘*arsh* and murdering of an unborn child.⁴⁵ A unique aspect of this doctrine is that the victim or his family has the options of insisting upon the punishment or accepting *diyyah* (blood money) or *sulh* (settlement) or forgiving the offender. As for a *diyyah*, a full *diyyah* is worth 100 camels or equivalent, subject to alteration. The full *diyyah* is to be paid not only for homicide but also for grievous bodily harm. With regard to the *sulh*, it implies that the injured or the family of the deceased can make a settlement on more or less the equivalent of *diyyah*. Thus, it leaves the door open to compassion and forgiveness.⁴⁶

Rape victims are protected and entitled to civil redress in the law of *qisās* for wounds or injuries (*dūn al nafs*). Everybody is designated ownership rights to each part of one’s body, and a right to retaliation or corresponding compensation for any harm done unlawfully to any of those parts. In the Sunnah, it is reported by Anas bin Mālik that al-Rubay‘ daughter of al Naḍr, his paternal aunt, broke the front tooth of a girl and they (the people of al-Rubay‘) asked the girl’s people to pardon her, but they refused; then they offered a fine, but the girl’s people refused, and they went to the Messenger of Allah (s.a.w.), but the girl’s people refused any offer but retaliation. So the Messenger of Allah (s.a.w.) ordered retaliation to be taken. Then Anas bin Mālik said, “O Allah’s Messenger, will the front tooth of al-Rubay‘ be broken? No, by Him who has sent you with the truth, her front tooth will not be broken.” The Messenger of Allah (s.a.w.) then replied, “O Anas, Allah’s Decree is retaliation.” But the people agreed to pardon her, so the Messenger of Allah said, “Among Allah’s slaves, there is one who if he took an oath in the name of Allah, he would fulfill it.”⁴⁷

⁴⁵ El-Awa, Mohamed S. *Punishment in Islamic Law*. Indianapolis: American Trust Publication, 1982, p. 71.

⁴⁶ Doi, ‘Abdur Rahman I. “Shariah: The Islamic Law.” Kuala Lumpur: A.S. Noordeen, 1984, p. 221.

⁴⁷ Narrated by al-Bukhārī in his *Ṣaḥīḥ*, book of *al-Sulh*, number of the hadith: 2504.

All jurists agree that *diyah* may replace *qisās* when it is not possible to apply it or when a peaceful agreement is achieved.⁴⁸

With regard to the law of *diyah* for injuries and wounds, it is sufficient to mention here the letter from the Prophet (s.a.w.) to ‘Amr bin Ḥazm when he was appointed to represent the Prophet (s.a.w.) in *al-Yaman*. In this letter, the Prophet s.a.w. explains the fixed amount of *diyah* as follows: “The blood money for a life is a hundred camels; that full blood money must be paid for the complete cutting off of a nose, eyes, the tongue, the lips, the penis, the testicles and the backbone; that for one foot half the blood money must be paid, for the wound in the head a third of the blood money, for a thrust which penetrates the body a third of the blood money, for a head wound which removes a bone fifteen camels, for each finger and toe ten camels, for a tooth five camels, and for a wound which lays bare the bone five camels.”⁴⁹

Harms to the sexual organ, therefore entitles a victim to appropriate financial compensation. The Majority of jurists opine that the loss of function is reckoned as equivalent to the loss of an organ. For example, the loss of reproductive function is similar to the loss of an organ.⁵⁰

If damage does not involve the whole organ or when the amount of loss of function is difficult to evaluate, a special formula of assessment called “*ḥukūmat al ‘adl*” is undertaken.⁵¹ This is an amount of money to

⁴⁸ Al-Zuhaylī, Wahbah. *Al-Fiqh al-Islāmī wa Adillatuh*. Damascus: Dār al-Fikr, 1984, vol. 7, p. 5738.

⁴⁹ Narrated by al-Nasā’ī in his *Sunan*, book of *al-Qasāmah*, number of the ḥadīth: 4770.

⁵⁰ Al-Kāsānī. *Badā’i’ al-sanā’i’*. vol. 7, p. 311; al-Zayla’ī, Fakr al-Dīn ‘Uthmān ibn ‘Alī. *Tabyīn al-Ḥaqā’iq*. Ed. Aḥmad ‘Izz ‘Inayah. Cairo: al-Maṭba‘at al-Amīriyyah, 1315AH, vol. 6, p. 131; al-Khurashī. *Ḥashiat al Khurashī alā Mukhtaṣar Sidi Khalīl*. vol. 8, p. 35, al-Mardawī, ‘Alā’ al-Dīn Abū al-Ḥasan ‘Alī ibn Sulaymān. *al-Inṣāf*. Ed. Muḥammad Ḥāmid al-Fāqī. Beirut: Dār al-Iḥyā’ al-Turāth al-‘Arabī, vol. 10, p. 88-90, al-Shīrāzī, *al-Muhadhdhab*, vol. 2, p. 207.

⁵¹ Ibn Nujaym specifies the admissibility of expert’s opinion on some issues which he accounts eleven cases from among which the evidence by an expert on determining the amount of compensation. See Ibn Nujaym, Zain al-‘Ābidīn Ibn Ibrāhīm. *al-Ashbāh wa al-Nazā’ir alā madhhab Abī Ḥanīfah al-Nu‘mān*. Beirut: Dār al-Kutub al-‘Ilmiyyah, 1993, p. 223.

be determined by the judge assisted by the experts and paid to the victim for the loss suffered.⁵² The calculation was applied to work out the percentage of loss of function which, when applied to the amount of the full *diyyah*, yielded a precise figure. Women who are raped suffer a sense of violation that goes beyond physical injury. They usually suffer psychological trauma which varies from individual to individual such as the feeling of perpetual defilement, an overwhelming sense of vulnerability, being distrustful of men and experience feelings of shame, humiliation, and loss of privacy and autonomy. They may also develop psychological disturbances related to the circumstances of rape such as intense fears. In addition, they most probably will experience social consequences such as difficulty to get married. Besides the law of *qisās* for wounds or injuries (*dūn al-naḥs*), these sorts of moral damages and consequences can also be compensated based on the principle of Tort (*al-fi 'l al-Ḍarr*). Damages are generally assessed according to the extent of the loss and damage suffered by the victim, provided always that the damages were the natural result of the criminal act.⁵³ In light of this, Al-Mawardī states that the guilty party is liable, however, for the compensation for the victim's severed limbs even if they are healed, and even if their total value is several times the blood money for murder.⁵⁴

Thus, the value of compensation differs based on circumstances of the damages and the nature of the crime. The judge will decide a proper *diyyah* for the damage. If an offender cannot afford to pay the *diyyah*, his family is called upon first to reimburse the amount. If the

⁵² Al-Zuhaylī. *Al-Fiqh al-Islāmī wa Adillatuh*. vol. 7, p. 5758.

⁵³ According to UAE laws of Tort, it is possible for a victim to make a claim for moral damages. These may include violation of a person's freedom, dignity, reputation, social or financial status. The victim or his heirs may claim additional compensation if they have legal grounds to do so. These claims may include, for example loss of future earning, moral pain and suffering or any other damages that the heirs have suffered as a direct result of the wrongful act or the death of the deceased. Compensation is therefore not limited to *diyyah*. (www.tamimi.com/publications/tort!.htm. 1999).

⁵⁴ Al-Mawardī, Abū al-Ḥasan 'Alī ibn Muḥammad ibn Ḥabīb al-Baṣrī al-Baghdādī. *al-Aḥkām al-Sulṭāniyyah*. (*The Ordinances of Government*). Trans. Wafaa H. Wahba. Reading: Centre for Muslim Contribution to Civilization, 1996, p. 255.

family is unable to pay, the clan or tribe may be required to pay. It acts as a great challenge for family and community to instill discipline in people. Even in a case where the offender dies, the debt will be passed on to the offender's heirs.⁵⁵ In the case of damages caused by more than one person such as gang rape, each of the involved persons will be liable for the extent of damages which was caused by his act for which he is liable.

CONCLUSION

Rape victims deserve adequate legal protection as well as a fair trial. According to Islamic law, every individual has a legal right to defend him or herself and to be protected from any physical violence. A person who reacts in self and honour defence or protecting his family or others from any sexual assault is not criminally responsible. Rape is a crime against one's honour and dignity and must be resisted and prevented by whatever means. The above discussion clarifies that a rape victim should not be treated similar to one who commits *zinā* as her claim of being raped is not an admission of committing *zinā* and should neither be charged with *qadhf* (false accusation of committing *zinā*) since it is her right and the right of the whole humanity to ensure that justice is done against the dangerous coward rapist who might repeat the same inhuman crimes in future. As a matter of fact, rape is different from *zinā* in terms of victimization, usurpation and absence of mutual willful consent. The paper also suggests that a rape victim is entitled to legal remedies under the principle of *diyah* and as such must be compensated accordingly for any material loss including but not limited to, medical treatment, moral damages and other kinds of related suffering unbearably borne by the victims. The Muslim legislative body of today and the government must outline an efficient form of compensation for damages to be paid to the victim in the light of *Shari'ah* principles.

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The heirs or '*āqilah*' responsible to pay *diyat* for the victims are male relatives who have a right to inherit from the murderer by means of relation (*nasab*) or *walā'* (emancipation of slavery). The '*āqilah*' of a person are actually his agnates ('*aṣabah*'). See al-Sharbīnī, Muḥammad ibn Aḥmad al-Khaṭīb. *Mughnī al-Muḥtāj*. Beirut: Dār al-Fikr, vol. 4, p. 95.